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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

To: The Commission

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Reply Comments of Paging Network, Inc.

PAGING NETWORK, INC.

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Summary

The majority of commenters in this proceeding recognized that the underlying purpose of the Telecommunications Act of 1996 (the "1996 Act") was to eliminate the artificial barriers to entering the wireline marketplace. In an attempt to gut provisions of the Omnibus Budget Reconciliation Act of 1993 ("1993 Act"), some parties stated that the 1996 Act's obligations and jurisdictional paradigm under Sections 251 and 252 apply equally to all CMRS providers. Congress made clear that the 1996 Act did not compromise or undermine its achievements under the 1993 Act. Therefore, CMRS providers continue to be subject to the jurisdiction of the FCC under Section 332 of the Communications Act of 1934, as amended by the 1993 Act.

Contrary to the LECs' rosy characterization of LEC interconnection negotiations, the DOJ adroitly recognized that there was no basis in economic theory or experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplinary would-be competitors, absent clear legal entitlement that they do so. Even where the services are not substitutes for basic local exchange services, such as in the paging/messaging context, the LECs have dragged their feet, charged exorbitant and unreasonably discriminatory rates, required providers to pay for facilities that were appropriately the LECs to provision, and otherwise used their monopoly power to delay entry, offer inferior interconnection,

and gouge the carriers. PageNet has no expectation that the CLEC-LEC interconnection negotiations are likely to proceed absent a nationwide policy and nationwide rules that act to create more equal bargaining positions between carriers.

The success of these interconnection negotiations are critical not just to the CLECs, but to other carriers, such as PageNet, who wish to have options to use carriers other than the dominant LEC. ILEC refusals to deal reasonably, for example, with respect to intended facilities, could stymie PageNet's ability to subscribe to certain facilities directly from the CLEC. The fact that the LECs know that unbundling will create other options for CMRS providers will create incentives in the LECs to limit unbundling. In time, the ILECs will limit the CLECs' ability to provide certain services and, in turn, so limit the CMRS providers' ability to interconnect with an alternative carrier. A well-crafted national policy, backed up by explicit national rules, will help to prevent this result.

A few parties advocated that CMRS providers, which include paging carriers, are subject to the 1996 Act's grant to the states of certain jurisdiction over the negotiations and arbitration of interconnection agreements under Sections 251 and 252. Almost all of these commenters address CMRS regulation as if all carriers within that umbrella classification were identically situated in terms of the types of services they offer and their substitutability for landline

telephone exchange service for a substantial portion of the communications within such state. Messaging carriers clearly do not offer services that are substitutes for landline telephone exchange service now, or for the foreseeable future.

Messaging carriers do not even come within the classification of local exchange carrier under the 1996 Act. The definition of local exchange carrier contained in Section 3(44) specifically excludes CMRS providers from that classification unless otherwise found to be included by the Commission. PageNet submits that such a finding would be appropriate, if at all, only if a service was a substitute for local exchange service for a substantial portion of the communications within an exchange. This factual predicate, however, simply does not exist for any CMRS service, let alone for messaging services offered by the traditional paging carriers.

The National Association of Regulatory Utility Commissions argued that CMRS interconnection, including the rates charged, falls within the purview of the states by virtue of Section 332's reservation to the states of jurisdiction over "other terms and conditions" of service. This argument is unsupportable both with respect to the classification of services that fall within CMRS and, specifically, with respect to messaging services. The rates that messaging carriers intend to charge landline incumbent local exchange carriers for interconnection, *e.g.* the use of

transport and termination facilities used by the LECs in terminating calls originated by their subscribers, is a rate. It, thus, does not come within Section 332's reservation to the states of the ability to regulate "other terms and conditions" where such regulation does not create barriers to entry.

An analysis of Sections 251 and 252 demonstrates that CMRS interconnection, as a class, is governed by Section 332. Section 251 contains a savings clause expressly preserving the Commission's plenary authority over LEC-CMRS interconnection under Section 201. In this regard, the Commission's authority is equal to that authority that it has over the rates charged by the LECs for the origination and termination of interstate traffic encompassed with the interstate access charge requirement. All CMRS calls are interstate and, thus, the facilities used to originate or terminate those calls, by whomever provided, are jurisdictionally interstate as well.

It would be unreasonable for the Commission to impose unbundling, access to rights-of-way, roaming requirements and other sorts of obligations on CMRS providers as a class, either directly or as a reciprocal obligation as part of LEC-CMRS interconnection. There is no provision in the 1996 Act which mandates that CMRS providers offer unbundling or other services enumerated above. Nor, is there any policy rationale for imposing such requirements under the Commission's general regulatory authority under the 1934 Act, as amended.

BellSouth and NWRA argue that Sections 251 and 252 should apply to CMRS providers because it would not be sound policy for the Commission to distinguish between telecommunications carriers on the basis of the technologies they employ. These entities overlook the fact that the Commission cannot conveniently ignore the two distinct and separate statutory provisions.

Notwithstanding the different jurisdictional bases and the different statutory obligations of wireless and wireline carriers, it would be bad public policy to allow ILECs to discriminate against carriers on the basis of the technology they deploy. The right to nondiscriminatory treatment, however, is not founded in the 1996 Act, but rather is a cornerstone of the 1934 Act's Sections 201 and 202. Nondiscriminatory treatment means that it would not be reasonable to deprive a wireless carrier of subscribing to facilities on the same terms and conditions as subscribed to by a competitive LEC. Both are co-carriers and both are entitled to nondiscriminatory treatment *vis-a-vis* the incumbent LEC.

CMRS providers' rights to compensation are not now integrally linked to the provision of exchange and exchange access services. CMRS providers are entitled to compensation for the costs they incur in terminating a LEC's traffic over their network.

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Reply Comments of Paging Network, Inc.

Paging Network, Inc. ("PageNet"), through its attorneys, hereby files its reply to the comments filed on May 16, 1996 on the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

Introduction

The overwhelming majority of commenters recognize that the underlying purpose of the Telecommunications Act of 1996 (the "1996 Act") was to eliminate the artificial barriers to competitive wireline entry that the incumbent local exchange carriers ("ILECs") and, in some instances, the state public utility commissions have raised in order to preserve the local exchange monopolies.

NPRM, ¶¶ II.B.2 However, in an attempt to gut provisions of the Omnibus Reconciliation Act of 1993, which amended the Communications Act of 1934 to grant the Federal Communications Commission (the "FCC" or the "Commission") sole jurisdiction over rates and entry of commercial mobile radio service ("CMRS") providers (with one narrow exception), some parties insist that the 1996 Act's obligations and jurisdictional paradigm under Sections 251 and 252 apply equally to all CMRS providers. PageNet's comments in the above-captioned proceeding demonstrated unequivocally that CMRS providers as a whole continue to be subject to the jurisdiction of the FCC under Section 332 of the 1996 Act.

NPRM ¶¶ II.B.2 The Congress made clear that the 1996 Act did not compromise or undermine its achievements under the 1993 Act, including the direction to the FCC to implement a national framework for wireless service in recognition of the interstate nature of the services provided. Congress expressly noted that the 1996 Act shall not be construed to modify, impair or supersede federal law unless expressly so

provided.[1] Needless to say, the 1996 Act contains no such provision.

In the interest of preservation of the Commission's resources, PageNet will not repeat in depth its demonstration that Section 332 governs. Thus, PageNet's reply comments hereafter will correct mistaken impressions certain parties have as to either the factual predicates under which the FCC could consider messaging carriers "local exchange carriers," and rebut inferences that messaging carriers should somehow be made subject to ILEC obligations under the 1996 Act.

I. The FCC Should Adopt Explicit Nationwide Rules And Policies

NPRM ¶¶ 25-33 NYNEX attempts to obliterate the federal role envisioned by Sections 251 and 252. It argues that "the 'new model' for achieving interconnection between competing LEC

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[1] 1996 Act, Section 601(c). In addition to the jurisdictional bar to consideration of LEC-to-CMRS interconnection under Sections 251 and 252 and, thus, under this NPRM, CTIA correctly points out the practical impediments to considering wireless issues in the context of this mega proceeding. CTIA Comments at 7. Simply put, the wireless issues are tangential to most of the issues raised and, as such, are likely to get less reasoned consideration in the push to resolve the purely wireline competition issues looming here. Neither the Commission nor the wireless industry can afford the short shrift that would necessarily occur should the Commission attempt to resolve those issues here.

networks . . . rel[ies] primarily on voluntary negotiation and agreement between incumbent LECs and competing carriers, with recourse initially to the state PUCs and then to federal courts."[2] In NYNEX's view, the adoption of national policies and rules would apparently be in violation of "Congressional intent that voluntary negotiations, not mandatory regulations, be the primary vehicle for achieving interconnection agreements between carriers."[3] Fortunately for the competitive industry, NYNEX is wrong. The Congress embraced a national framework which would govern the scope and breadth of negotiations, not a piecemeal state-by-state framework which would slow competitive entry.

Contrary to the LECs' rosy characterization of LEC interconnection negotiations, the DOJ adroitly recognizes that "[t]here is no basis in economic theory or experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplinary would-be competitors, absent clear legal entitlement that they do so."[4]

Even where the services are not all going to be direct substitutes for basic local exchange services, such as in the

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[2] NYNEX Comments at 3.

[3] *Id.*

[4] Department of Justice Comments at 10. *Also see* Illinois Commerce Commission Comments at 4.

paging/messaging context, the LECs have dragged their feet, charged exorbitant and unreasonably discriminatory rates, required CMRS providers to pay for facilities that were appropriately the IECs to provision, and otherwise used their monopoly power to delay entry, offer inferior interconnection, and gouge the carriers.[5] PageNet has no expectation that the CLEC-LEC interconnection negotiations are likely to proceed any differently absent an express nationwide policy and explicit nationwide rules which effectively act to create more equal bargaining positions between co-carriers.

NPRM ¶¶ 74-116 Nationwide policies and rules, hopefully leading to successful negotiations, are critical not just to the CLECs, but to other carriers, such as PageNet, who wish to have options to use carriers other than the dominant LEC. ILEC refusals to deal reasonably, for example, with respect to interconnection facilities could stymie PageNet's ability to subscribe to certain facilities directly from the CLEC. LECs know that unbundling will create a choice of carrier options for CMRS providers. LECs, thus, have incentive to limit unbundling, so that, in time, they limit the CLECs' ability to provide certain services and, in turn, so limit the CMRS providers' (and other carriers' and customers') ability to

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[5] *See* PageNet Comments in CC Docket 95-185, incorporated herein by reference, at pp. 41-48.

interconnect with an alternative carrier. A well-crafted national policy, backed up by explicit national rules, will help to prevent this result. Absence of such a well-crafted policy with explicit national rules will assure it.

NPRM ¶¶ 74-116 Unbundled local switching would be a benefit to CMRS providers, but no LEC offers such unbundled switching today. For example, if local switching were unbundled, CMRS providers could subscribe to a CLEC facility for traffic originating at the CMRS provider. In that circumstance, the CMRS provider could subscribe to a CLEC facility between the MTSO and the LEC end office, and a LEC unbundled switching element. Alternatively, it could subscribe to a LEC facility for the MTSO originating traffic, and the resold unbundled switching facility offered by a CLEC.

Further, the ILECs should not be permitted to limit unbundling to those facilities that are unbundled today. The position simply is intended to freeze, in place, the monopoly status of the LECs.

II. Messaging Providers Are Not Local Exchange Carriers Under Either The 1996 Or The 1993 Acts.

NPRM ¶ II.B.2(e)(2) Despite the clear intent of both the 1993 and 1996 Acts, a few parties continue to advocate that CMRS providers and, by implication, paging carriers which are subsumed under that regulatory classification, are subject to the 1996 Act's grant to the states of certain jurisdiction

over the negotiations and arbitration of interconnection agreements under Sections 251 and 252. The National Wireless Resellers Association ("NWRA") goes so far as to claim that CMRS providers are, in fact, "local exchange carriers" and are, thus, required to follow the resale, number portability, dialing parity and access to rights-of-way, and reciprocal compensation requirements of Section 251(b).[6] These arguments have no basis in fact or law.

In the first instance, almost all of these commenters address CMRS regulation and, thus, jurisdiction as if all carriers within that umbrella classification were identically situated in terms of the types of services they offer and their substitutability for landline telephone exchange service for a substantial portion of the communications within such state.[7] Clearly, messaging carriers do not fit within that classification now or for the foreseeable future. Messaging services today are generally one-way non-interactive communications and are neither intended nor do they supplant

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[6] NWRA Comments at 5.

[7] According to Section 332(c)(3), states may regulate providers of commercial mobile radio service (where such services are a substitute for landline telephone exchange service for the substantial portion of the communications within such state).

basic two-way interactive voice telephone services we know as plain old telephone service.[8] To suggest otherwise is ludicrous. Even those narrowband messaging services being introduced presently are not two-way interactive communications. These services consist of two one-way communications and, thus, do not replicate or replace a subscriber's local business or residential phone service.

As PageNet noted in its comments, messaging carriers do not come within the classification of local exchange carrier under the 1996 Act. The definition of "local exchange carrier" contained in Section 3(44) specifically excludes CMRS providers from that classification unless otherwise found to be included by the Commission. PageNet submits that such a

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[8] NYNEX continues to misunderstand the way in which paging calls are routed. NYNEX contends that "a LEC customer first terminates a call with the paging provider, and then the paging provider institutes a second message over its private network to its subscriber. There are two flaws in NYNEX's description. The first is that it is not the LEC customer which terminates the call with the paging provider. It is the LEC over whose facilities the call originates. Customers do not terminate calls. Networks do. Second, the paging carriers do not institute a second message. It switches the message from the wireline, typically trunk side connection, to the line side wireless facilities over which the call will be routed to the paging subscriber. NYNEX, however, is not wrong in its implicit assumption that one-way paging service does not "intercommunicate" to the extent that term requires two-way interactive communications between the originating and terminating facilities.

finding would be appropriate, if at all, only if a service was a substitute for local exchange service for a substantial portion of the communications within an exchange -- a factual predicate which simply does not exist for any CMRS service, let alone for messaging services offered by the traditional paging carriers.

III. CMRS Interconnection And Unbundling Are Subject To Federal Jurisdiction

NPRM § II.B.2(e)(2) The National Association of Regulatory Utility Commissions argues that CMRS interconnection, including the rates charged, falls within the purview of the states by virtue of Section 332's reservation to the states of jurisdiction over "other terms and conditions" of service.[9]

NARUC's argument is unsupportable both with respect to the classification of services which fall within CMRS and, specifically, with respect to messaging services.

Addressing messaging first, the rates that messaging carriers intend to charge landline incumbent local exchange carriers for interconnection, *e.g.* the use of transport and termination facilities used by the LECs in terminating calls originated by their subscribers, is a rate. It is no less a rate than the amounts traditionally charged by LECs to their

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[9] 47 USC § 332.

customers and co-carriers for use of their facilities. It, thus, does not come within Section 332's reservation to the states of the ability to regulate "other terms and conditions" where such regulation does not create barriers to entry.

An analysis of Sections 251 and 252 demonstrates that CMRS interconnection, as a class, is governed by Section 332. As PageNet's comments make clear, Section 251 contains a savings clause expressly preserving the Commission's plenary authority over LEC-CMRS interconnection under Section 201.[10] In this regard, the Commission's authority is equal to that authority which it has over the rates charged by the LECs for the origination and termination of interstate traffic encompassed with the interstate access charge requirement. All CMRS calls are interstate and, thus, the facilities used to originate or terminate those calls, by whomever provided, are jurisdictionally interstate as well.[11]

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[10] Section 251(i) states that "[N]othing within [Section 251] shall be construed to limit or affect the Commission's authority under Section 201."

[11] NYNEX and others continue to argue that states still have jurisdiction to regulate "intrastate" interconnection rates of the LECs as they pertain to CMRS. What these parties fail to see is that no jurisdictionally intrastate CMRS service or rates exist. Both the nature of the service as it has evolved and the 1993 Act assure this result.

It would also be unreasonable for the Commission to impose unbundling, access to rights-of-way, roaming requirements and other sorts of obligations on CMRS providers as a class, either directly or as a reciprocal obligation as part of LEC-CMRS interconnection. The Department of Justice's ("DOJ") comments eloquently express PageNet's views in this regard. According to the DOJ:

> [It] opposes any proposal to impose mandatory duties to deal, beyond those duties deemed necessary by Congress, on parties that lack significant market power. One of the principle features of a competitive marketplace is that parties generally have a right to differentiate their prices, products or services to make them more attractive to consumers. That right spurs firms to make the investments and take the risks that provides the creative energy that drives competitive markets. Thus, antitrust generally recognizes a party's right to refuse to deal with potential rivals. Only where a firm or group of firms has attained market dominance through utilization of an asset that cannot be replicated at reasonable costs have the antitrust laws required mandatory dealing.[12]

There is no provision in the 1996 Act which mandates that CMRS providers offer unbundling or other services enumerated above. Nor, as the DOJ explains, is there any policy rationale for imposing such requirements under the Commission's general regulatory authority under the 1934 Act, as amended. Clearly, messaging carriers control no bottleneck

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[12] Department of Justice Comments at 22.

facilities, nor do the carriers seeking unbundling make such an allegation. Rather, they merely seek to avoid being required to make the investment in facilities, or negotiate the voluntary arrangements necessary to secure the rights to use the facilities of others. As the DOJ points out, to require such an outcome itself "would be anticompetitive."[13]

IV. The 1993 And 1996 Acts Provide Separate FCC Jurisdictional Bases For Adoption Of A National Framework.

NPRM § II.B.2(e)(2) BellSouth and NWRA argue that Sections 251 and 252 should apply to CMRS providers because it would not be sound policy for the Commission to distinguish between telecommunications carriers on the basis of the technologies they employ. However, these entities overlook the fact that the Commission cannot conveniently ignore the two distinct and separate statutory provisions by which Congress has seen fit to regulate CMRS and wireline services. Congress, in fact, recognizes that there may be circumstances when the two service offerings should be governed by the same statutory provisions and, specifically, enumerates those circumstances. According to Congress, they will be subject to the same statutory provisions when they are offering equivalent local exchange services to a substantial portion of the local

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[13] Department of Justice Comments at 23.

exchange marketplace. We do not have such a circumstance here.

Notwithstanding the different jurisdictional bases and the different statutory obligations of wireless and wireline carriers, it would be bad public policy to allow ILECs to discriminate against carriers on the basis of the technology they deploy. The right to nondiscriminatory treatment is not founded in the 1996 Act, but rather is a cornerstone of the 1934 Act's Sections 201 and 202. This Commission has found, for example, that it is not permissible to discriminate against wireline and wireless carriers in the allocation of telephone numbers. Rather, in order to avoid discrimination, the Commission has explicitly declared that, for example, numbering administration and allocation should be technology neutral.[14]

Similarly, it could not be reasonable to deprive a wireless carrier of subscribing to facilities on the same terms and conditions as subscribed to by a competitive LEC. Both are co-carriers. Both are entitled to nondiscriminatory treatment *vis a vis* the incumbent LEC.

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[14] *See In Re Proposed 708 and 630 Numbering Plan Area Code by Ameritech, Declaratory Ruling and Order*, 10 FCC Rcd 4596, 4603 (1995).

V. CMRS Providers Are Entitled To Termination Compensation

NPRM § II.B.2(e)(2) BellSouth argues that CMRS providers "'may' fall within the scope of a requesting telecommunications carrier" for purposes of Section 251(b)(5) provided that the requested interconnection is for the purpose of providing "telephone exchange service and exchange access service under Section 251(c)(2).'[15] However, CMRS providers' rights to compensation are not now integrally linked to the provision of exchange and exchange access services. CMRS providers are entitled to compensation for the costs they incur in terminating a LEC's traffic over their network. The right to compensation does not flow from the provision, *per se*, of either exchange or exchange access services, nor does the right stem from the 1996 Act, as BellSouth suggests.[16]

Citizens Utilities Company ("Citizens") attempts to eliminate paging carriers' rights to compensation, claiming that LECs have no "opportunity to offset its increased call

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[15] BellSouth Comments at 63.

[16] PageNet understands BellSouth's attempts to use the 1996 Act as the sole statutory basis, if any, for the payment of compensation to CMRS providers as it would negate BellSouth's culpability for failure to pay compensation to the CMRS providers under the Commission's prior determination that CMRS providers were so entitled. Even here, PageNet notes that BellSouth is attempting to pursue its option to claim there is no such entitlement through its use of the word "may" instead of "shall" ("may be entitled to compensation under Section 251).

generation costs with revenues from terminating traffic delivered by the other carrier."[17] It goes on to say that state commissions "may be reluctant to allow incumbent LECs to raise local exchange rates to recover the costs of terminating compensation."

Citizens completely misses the point. In their view, paging carriers should pay the LECs for the LEC's provision of service to LEC customers. Tellingly, nowhere in Citizen's comments do they claim that terminating costs are not appropriately theirs to bear, just that they fear they will not be able to recover them. For its part, PageNet is more concerned about recovering the costs it incurs on behalf of the LEC customers, from the LECs. PageNet believes the LECs already recover their costs, but even if they do not, PageNet should not be required to bear costs that are appropriately the LECs' to bear. To suggest otherwise would be ludicrous, essentially putting PageNet in the landline local exchange carrier business.

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[17] Citizens Utilities Company Comments at 23.

VI. Conclusion

For the foregoing reasons, PageNet respectfully submits that the FCC should adopt the statutory interpretations and implementing rules specified herein.

Respectfully submitted,

PAGING NETWORK, INC.

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